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Special
Report
No. 180

The 1988 Trade Bill

United States Department of State
Bureau of Public Affairs
Washington, D.C.

The following report was presented by Ambassador Alan F. Holmer, Deputy U.S. Trade Representative, and Judith Hippler Bello, General Counsel, Office of the U.S. Trade Representative, to a conference of foreign diplomats at the Department of State, Washington, D.C., September 19, 1988.

In 1974, the United States was the world's largest international creditor. Its merchandise trade deficit was $5.5 billion, and exports had surged 38% from the previous year. And if imports of petroleum (whose price had quadrupled in 1973) were excluded, the U.S. merchandise trade position was a surplus of more than $21 billion. In this economic environment, the Congress passed a landmark trade bill providing:

- Authority for trade agreements;
- A new trade remedy called section 301 to enforce trade agreements and respond to other unfair foreign government practices;
- Section 201 escape clause relief through temporary safeguards measures; and
- Some changes to other U.S. trade laws.

In 1988, the U.S. economic picture is significantly different. Since 1974, the United States has become the world's largest international debtor, its net foreign debt exceeding that of Brazil, Argentina, Mexico, and all other Latin American countries combined. Its trade deficit—while reduced from the peak of $170 billion in 1987—is likely this year to be between $135 and $140 billion. And certain trading partners have amassed extremely large bilateral surpluses in trade with the United States, ranging up to $59.8 billion for Japan in 1987.

In such far differing circumstances, new U.S. trade legislation could reasonably be expected to be quite different as well. Yet the major trade provisions of the Omnibus Trade and Competitiveness Act of 1988 provide:

- Authority for trade agreements;
- Amendments to the section 301 trade remedy;
- Minor amendments to the section 201 escape clause remedy; and
- Relatively minor amendments to some other trade remedies.

With the recent passage and signature of the 1988 Trade Act, it is time to stop stigmatizing, criticizing, propagandizing, and exaggerating this legislation and, instead, to analyze it dispassionately. Relieved of all the emotional rhetoric surrounding its history, the final bill signed by the President clearly continues rather than contorts traditional U.S. trade policy and renews rather than reneges on the U.S. commitment to the multilateral trading system. It does not legislate barriers at our borders to close the U.S. market and create a "Fortress America" but rather simply provides better trade remedy tools to use judiciously to open foreign markets.

What the Bill Does Not Do

Before reviewing the bill's principal trade provisions, it is worthwhile to remember what this bill does not do. Earlier omnibus trade bills included provisions that would have:

- Established quotas on imports of lamb and steel products or unilaterally revoked most-favored-nation treatment for Romania and Angola;
- Created a private right of action in U.S. courts for customs fraud, in addition to current administrative remedies;
- Provided a draconian remedy—exclusion from the U.S. market—for "scofflaw" (i.e., repeat) offenders of U.S. customs laws;
- Included requirements for the carriage of automobiles on U.S. vessels;
- Required the President to provide relief automatically in safeguards actions in which the U.S. International Trade Commission (ITC) found injury to U.S. producers;
- Broadly mandated retaliation in section 301 cases and required the "self-initiation" annually of such investigations (even when U.S. industry did not seek such an action);
- Redefined the term "subsidy" in the countervailing duty law to expand its application;
- Provided a private right of action in U.S. courts for dumping in addition to the antidumping law;
- Provided relief against diversionary ("upstream" or "down-stream") dumping, in violation of existing international rules;
- Required application of the countervailing duty law to nonmarket economies;

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• Amended the dumping law to make it vastly more likely that the Commerce Department would find dumping where foreign producers and exporters sold in the United States through a related company;

• Amended the dumping law to make it more likely that the Commerce Department would find dumping in any case involving imports from a nonmarket economy; and

• Required the imposition of sweeping trade sanctions against "terrorist" nations.

In response to strong objections from the Administration (echoed by many trading partners), the Congress simply dropped these and many other protectionist provisions which were antigrowth, antijobs, anticonsumer, and anti-U.S. competitiveness.

In part, this accomplishment was possible because the two bills passed by the House of Representatives and the Senate differed so substantially. The Senate bill was more objectionable on sections 201 and 301, telecommunications, and a host of foreign relations-type amendments. The House bill was more problematic on amendments to the antidumping and countervailing duty laws and other nontrade provisions, such as the Bryant amendment (requiring the registration and disclosure of foreign investment in the United States). This was no accident. Those in the Administration and Congress who wanted a protrade bill worked diligently at early stages of the process to ensure that it was legislatively possible for the conferees to choose a protrade course. In virtually every instance where the conferees had a choice, they chose the protrade alternative.

In addition, many precisely or nearly identical provisions included in both bills were dropped by the 199-member trade conference in response to Administration objections. Although the conference's mandate was limited to resolving differences between the two bills, conferees, nonetheless, dumped provisions from both bills on, for example, Romanian most-favored-nation treatment, the carriage of automobiles on U.S. vessels, and sugar duty drawback.

Even when the trade conferees declined to eliminate provisions altogether, time and again they worked with the Administration to modify them acceptably. Some provisions that originally had a protectionist bent were recast into acceptable trade remedies with sufficient executive discretion to enable their judicious, trade-liberalizing use.

All of this is not to say that the bill is perfect. A number of provisions remained objectionable to the Administration. Indeed, as President Reagan said when he signed the bill on August 23, 1988: "There are some things in this bill I don't like." But the President also noted that the emphasis and thrust of the bill are to open markets and ensure fair play around the world, as the following analysis shows.

Trade Agreements Authority

The centerpiece of the trade provisions of the 1988 Trade Act is the renewal of authority for trade agreements. While the President's constitutional powers to conduct the foreign affairs of the United States enable him to negotiate trade agreements without Congress' blessing, the Congress' constitutional powers to regulate commerce require an effective executive-congressional partnership to make the trade agreements program work.

In 1967, the executive, without Congress' blessing, negotiated agreements relating to dumping and the American selling price system, but Congress subsequently refused to implement them. To prevent such a recurrence, Congress and the President invented the so-called fast track procedures in the Trade Act of 1974. They don't guarantee that Congress will approve and implement trade agreements that the President negotiates. But they ensure that Congress will review such agreements on an expedited, nonamendable basis, greatly enhancing the prospects for congressional implementation.

The principal achievement of the 1988 act, like the 1974 act, is its enactment of fast track procedures. Until May 31, 1991—5 months after the Uruguay Round is scheduled to conclude—the President has access to congressional fast track procedures for any trade agreements he concludes. And just in case the Uruguay Round continues a bit longer, the President's access can be continued for 2 additional years—until May 31, 1993—if only he certifies to the Congress that, despite progress in the negotiations, more time is needed to conclude them.

These provisions renew the U.S. commitment to the multilateral trading system which has dominated U.S. trade policy since the establishment of the General Agreement on Tariffs and Trade (GATT) in 1947. The United States continues to believe that peace and prosperity for all nations are best served by agreement on, and observance of, fair multilateral rules by the international community. Today's global economy requires multilateral solutions to what are, inevitably, increasingly multilateral problems defying merely unilateral—and often even bilateral—responses.

It was this abiding faith in the efficacy of the international trading system that led the United States in September 1986 to spearhead the launch of the current Uruguay Round of multilateral trade negotiations. We want to modernize the GATT—by improving existing but inadequate rules, as with respect to agriculture and dispute settlement, and by extending GATT discipline to frontier trade areas such as services, investment, and intellectual property. The 1988 act expresses strong, bipartisan support for the Administration's negotiating objectives in these areas. And the tariff authority is the broadest that has been provided to any Administration in decades.

To endure and prosper, the GATT must both shore up and extend its foundations. In the dynamic 20th (and in the doubtless even more dynamic 21st) century, the GATT must go forward and revitalize or it will surely fall back and decline. Merely treading water is neither possible nor acceptable.

Early in the process of the 1988 act (1985 and 1986), it seemed to the authors that arguing to a congressional committee that a provision violated the GATT was perceived by some members of Congress as a reason to support the provision. At least one senator called the GATT the "Gentleman's Agreement to Talk and Talk." But all that had changed by 1988. The leadership of the trade committees decided to rid the bill of all GATT-illegal provisions. They were uniformly successful. No GATT-illegal provisions remain in the 1988 act.

This, then, is the central message of the 1988 act: the United States wishes not only to maintain freer trade to the extent it now exists but also to extend freer trade, to open more markets, and to increase the predictability of international rules for businesses. In this direction lie the best prospects for enhancing world wealth, peace, and prosperity.

Section 301

While our principal objective is to achieve multilateral trade liberalization, sometimes this goal can be stimulated through bilateral or even unilateral initiatives. Section 301 was enacted in 1974 as the domestic trade remedy designed to help reach and enforce trade

agreements by providing for unilateral measures in response to foreign government unfair trade practices. Unilateral action—retaliation—was never conceived as the objective of section 301; rather, the credible threat of retaliation was intended to serve as a stick that, in combination with the carrot of an open U.S. market, could pry open foreign markets and thus further liberalize trade.

The United States has been criticized for its aggressive use of section 301. Yet the results of this program in the last 3 years have been substantially more open, freer trade, widely benefiting producers and exporters in third countries as well as the United States, for example:

- The settlement we reached with Japan on its treatment of beef[1] and citrus imports will benefit cattlemen in Australia and New Zealand, as well as in Montana, and citrus growers in the Mediterranean and South America, as well as in Florida and California.
- The nondiscriminatory tariff reductions Japan made to compensate for its GATT-illegal leather and leather footwear import quotas improve access to Japanese markets for producers and exporters around the globe.
- The U.S. section 301 action against the European Economic Community (EEC) for its hormone directive resulted in a settlement under which foreign meat products—U.S. and third country alike—can continue to be imported into the EEC in 1988.
- The section 301 investigation of Korean intellectual property practices resulted in an agreement under which intellectual property rights—U.S. and third country—are more effectively protected to the benefit of patent and copyright holders around the globe.
- By enacting mirror quotas under section 301 against GATT-illegal import quotas established in Portugal during the EEC "enlargement" to include Portugal and Spain, the United States helped preserve freer trade in Portugal, to the benefit of all nations exporting to the EEC.
- In the Japan semiconductors case, the United States sought to obtain more equal access to the Japanese "chip" market for all foreign producers of semiconductors. Japanese observance of this commitment would have benefited both U.S. and third-country chip producers.
- U.S. investigations of Taiwanese practices resulted in Taiwan's application of practices consistent with the customs valuation code and improved access for exporters of all nationalities to the Taiwan markets for beer, wine, and tobacco products.

These efforts by the United States illustrate how bilateral agreements—achieved in part to avoid the unilateral imposition of sanctions—often have a multilateral, trade-liberalizing effect that complements rather than detracts from the GATT system.

The 1988 Trade Act does amend section 301 significantly. It is intended to make it harder for the executive branch to sit on its hands and do nothing (or next to nothing) in response to a foreign government's unfair trade practices. But although it increases pressure on the executive to act (and act decisively), it preserves sufficient discretion to ensure that such action can be judicious and trade liberalizing, for example:

Transfer of Authority. The Trade Act specifically authorizes the U.S. Trade Representative to determine whether a foreign practice is unfair and to act in response. Yet this alleged "transfer" of authority is more symbolic than real. The U.S. Trade Representative serves at the pleasure of the President, who retains constitutional authority to direct the actions of his subordinates.

Mandatory Retaliation. The act requires retaliation in response to violations of trade agreements and other agreements if such violations burden or restrict U.S. commerce. Yet the scope of this requirement is limited to breaches of agreements and, even then, reasonable exceptions are provided, i.e., if:

- A GATT dispute settlement panel finds that U.S. rights under the trade agreement have not been denied;
- A foreign government eliminates or agrees to phase out the practice complained of or its burden or restriction on U.S. commerce;
- A foreign government provides compensatory trade benefits, or the Trade Representative determines that action under section 301 would cause serious harm to the national security; or
- The Trade Representative determines (in extraordinary cases) that action under 301 would cause harm to the economy substantially out of proportion to its benefits (taking into account the effect of inaction on the credibility of the section 301 program.

Illustrative Unfair Practices. The act specifies export targeting, denial of worker rights, and governmental toleration of systematic private anticompetitive activities as practices that can be actionable under section 301, if they burden or restrict U.S. commerce. But no responsive action is required, even if these criteria are satisfied. And the statute underscores the discretion of the U.S. Trade Representative not to initiate a section 301 investigation if he finds it would not be effective in addressing the practice.

The effect of these admendments is essentially to ensure the perpetuation of the aggressive, effective use of the section 301 program by the Reagan Administration over the last 3 years. They do not require protectionist actions, as they allow ample discretion with respect to their application. But they sharpen and hone this particular trade remedy tool so that it can be used effectively to promote open markets and thus to further liberalize trade.

Clearly the most effective action that can be taken by a foreign country that fears the "sting" of section 301 would be (1) to ensure that its market is truly open to imports and (2) to join the United States and other trading partners in pushing for meaningful progress in the Uruguay Round. This is the market-opening objective we seek and which we believe section 301 can help us achieve.

"Super 301"

So-called super 301 requires the Trade Representative to start some (number unspecified) section 301 investigations on his own motion in 1989 and 1990. Based on the annual National Trade Estimates Report identifying foreign barriers to trade and investment, he is to identify "priority trade-liberalizing practices and countries" and then seek to negotiate elimination of these unfair practices.

Self-initiated investigations or actions were unprecedented until 1985, when the Trade Representative and the President began resorting to them as appropriate responses to priority trade problems. The Trade Representative self-initiated investigations of Korean insurance and intellectual property practices and Japanese tobacco and Brazilian informatics policies. And the

[1] This was not actually a section 301 case, but failure to achieve a satisfactory result would almost certainly have provoked action under section 301.

President took self-initiated action in response to EEC agricultural practices in connection with Portugal's and Spain's accession to the Community, the EEC hormone directive, and Taiwanese customs valuation and beer/wine/tobacco practices.

Some (including the U.S. Chamber of Commerce) consider "super 301" as requiring investigations of "generic" or "bundled" foreign practices rather than traditional, more narrowly circumscribed practices (such as Japan tobacco or Brazil pharmaceuticals). The act certainly permits, but does not require, this approach. The extensive debate on this provision in the Senate stresses that "super 301" is not the son of the Gephardt amendment (which would have required draconian trade sanctions unless "excessive and unwarranted" bilateral trade surpluses of other nations with the United States were reduced at least 10% each year).

Self-initiated Intellectual Property Section 301 Cases

Another self-initiation requirement is to begin investigations each year—to be conducted on an expedited basis—of denials of adequate and effective protection of intellectual property rights by "priority" countries. The act gives the Trade Representative substantial discretion with respect to this exercise. First, he must identify those countries:

- That have the most onerous or egregious practices that deny adequate protection of intellectual property rights or deny fair and equitable market access to U.S. persons that rely on the protection of intellectual property rights;
- Whose practices in this regard have the greatest adverse impact on the relevant U.S. products; and
- That are not already entering into good faith negotiations or making significant progress in negotiations already underway.

The act also expressly exempts the Trade Representative from the self-initiation requirement if he determines that such initiation would be detrimental to U.S. economic interests.

Antidumping and Countervailing Duty Laws

Trade experts have widely pronounced the 1988 act as the "cleanest" package of antidumping and countervailing duty amendments in decades. As already noted, a host of GATT-illegal antidumping and countervailing duty provisions was either dumped from the bill or completely transformed into GATT-consistent provisions (such as replacing a diversionary dumping provision in violation of Article VI of the GATT and the GATT Antidumping Code, with domestic authority to implement Article 12 of the GATT Antidumping Code).

Perhaps the most interesting—albeit still modest—amendment in this regard is enhanced authority for the U.S. Department of Commerce (after taking into account any advice offered by the U.S. International Trade Commission) to prevent circumvention of antidumping and countervailing duty orders through:

- Only minor alteration of affected merchandise; or
- Limited further assembly in the United States or third countries.

This anticircumvention authority applies only to products already subject to antidumping and countervailing duty orders. Moreover, this change is quite conservative compared to, for example, recently adopted and implemented antidumping practices of the European Economic Community with respect to "screwdriver assembly" operations within the EEC.

In fact, the antidumping and countervailing duty amendments in the 1988 act include one quite innovative provision clearly intended to retain consistency with international trade rules. On the one hand, the Congress has defined in the act what constitutes an industry in cases involving processed agricultural products. On the other hand, it simultaneously provides that this definition shall cease to have any effect if:

> . . . the Trade Representative notifies the [Department of Commerce] and the [International Trade] Commission that the application of this [provision] is inconsistent with the international obligations of the United States.

This expression of congressional deference to the international obligations of the United States signals a marked respect for and a renewed commitment to the multilateral trading system. This amendment reflects the Congress' desire, wherever possible, to formulate U.S. trade policy and to make and apply new U.S. trade law so to complement rather than thwart the GATT and multilateral trade liberalization.

Section 201

Section 201 is the trade remedy through which the United States exercises its rights under Article XIX of the GATT temporarily to restrict increasing imports that are injuring a U.S. industry. Article XIX bestows this right but establishes a corresponding obligation: to compensate affecting trading partners for such temporary "escape" from normal GATT obligations.

Section 201—past, present, and future—is the vehicle for exercising this right and meeting this obligation. The 1988 amendments do not change it substantially. Relief may be provided by the President only if the U.S. International Trade Commission finds that increasing imports are a substantial cause of serious injury. And even if the ITC finds such injury, the President is not required to provide relief if he believes that the costs of such action outweigh its benefits. In this respect, the Congress specifically rejected recommendations that the President be required to provide import relief if recommended by the ITC. Thus the fundamental parameters of this remedy remain unchanged.

The theme of some section 201 amendments is, nonetheless, significant, because it stresses that the purpose of section 201 relief is to promote adjustment by U.S. producers to import competition. Petitioners are not required to file adjustment plans, nor are individual firms required to make commitments about their plans for any adjustment. And most importantly, governmental officials do not determine for the industry and firms concerned how they should adjust to import competition.

But plans may be filed and commitments may be made, and the ITC is required to take this information into account in shaping its recommendations about relief (if it finds the requisite injury to U.S. industry). The ITC is required to recommend those actions that will not only address the injury but also be most effective in facilitating the domestic industry's positive adjustment to import competition. The President likewise must take into account the industry's adjustment efforts (including any adjustment plan or commitment submitted to the ITC).

The amendments to section 201 expand the options for the President beyond traditional import relief, such as international negotiations or submission of legislative proposals. In addition, if an industry has received relief under

section 201 for some time period, it cannot submit a new petition until an equivalent time period has elapsed.

The act's amendments to section 201, then, essentially underscore the reason GATT Article XIX permits temporary safeguards measures (subject to the obligation to provide compensation): that is, to allow producers seriously harmed by increasing imports a respite in which to adjust to import competition.

Conclusion

The overall thrust of the trade provisions of the Omnibus Trade and Competitiveness Act is to open markets and liberalize trade. Procedurally, it does increase the pressure on the President, and the U.S. Trade Representative in particular, to achieve desired and desirable trade liberalization. But it does not violate the international obligations of the United States, nor force the Administration down a protectionist path. It provides the executive branch with tools with which to achieve trade liberalization and gives it substantial discretion to exercise in deciding how to use them in particular cases.

Yes, the act could theoretically be administered by a future administration in a protectionist way. But that is true of prior law as well, and it is equally true that the act can be administered in a way that promotes rather than undermines multilateral trade liberalization. For these reasons, those who are concerned about the act should withhold judgment pending its actual administration. ■

Published by the United States Department of State • Bureau of Public Affairs
Office of Public Communication • Editorial Division • Washington, D.C. • December 1988
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